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No. 91-796

Supreme Court, U.S.
FILED
JAN 17 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NELL A. CAMMACK, *et al.*,
Petitioners,

v.

JOHN WAIHEE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENTS UNITED PUBLIC WORKERS, LOCAL 646, AND HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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STATEMENT OF THE CASE

Respondents United Public Workers, Local 646, American Federation of State, County and Municipal Employees, and Hawaii Government Employees' Association, Local 152, American Federation of State, County and Municipal Employees (hereinafter "Respondents AFSCME"), adopt the Statement of the Case presented in the Brief in Opposition submitted by the State Respondents.

ARGUMENT

Although the statute in question here is far from unique, the Ninth Circuit opinion in this case is the first and only federal court of appeals or state court of last resort case concerning the question whether giving state employees the day off from work on Good Friday, without more, violates the Establishment Clause. In holding that there is no such violation, the Ninth Circuit enunciated and carefully applied this Court's present Establishment Clause doctrine, as developed in the line of cases beginning with *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Petitioners do not broadly question the *Lemon* doctrine in general,[1] nor do they (or could they) contend that there is a conflict among the circuits or with a state court on the specific issues in this case, necessitating this court's review. *See* Supreme Court Rules Rule 10.1. Rather, petitioners raise only narrow issues concerning the proper application of the *Lemon* doctrine, claiming that those issues are raised by the decision below and are worthy of this Court's plenary review. The Petition's strained attempts to delineate a cert-worthy question, however, misstate the holdings below, seek to involve the Court in an essentially factual dispute concerning the

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[1] Several members of this Court have suggested that it may be appropriate to develop a *less* restrictive Establishment Clause mode of analysis than the one used in *Lemon* and its progeny. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 108-14 (1985) (Rehnquist, J., dissenting); *id.* at 90-91 (White, J., dissenting). In this case, however, petitioners are, if anything, arguing that the *Lemon* standard should be *tightened* so as to invalidate governmental actions now permitted under this Court's Establishment Clause analytic approach.

Moreover, the question whether to abandon *Lemon* in favor of a less restrictive analytic method would arise in this case only if petitioners could first demonstrate that the court below was wrong in concluding that under the *Lemon* approach as properly applied, Hawaii's choice of holidays did not violate the Establishment Clause. As we show in the text, petitioners have raised no cert-worthy issue in that regard.

purpose of a particular state statute, and ignore controlling precedent of this Court.

1. Under *Lemon*, *supra*, a state statute will survive scrutiny under the Estblishment Clause of the First Amendment as long as it meets three conditions: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-13 (citation omitted; quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)). Petitioners' principal argument before this Court is that the statute in question, Hawaii Revised Statutes Section 3-1 (hereinafter "the Statute"), lacks a sufficient "secular legislative purpose" and therefore violates the first *Lemon* prong.

Under the "purpose" prong of the *Lemon* test, all that is necessary for the statute to pass Establishment Clause scrutiny is *a* legitimate secular purpose; there is no requirement that the secular purpose be the *only* purpose, or that there be *no* additional religious purposes. As the Court stated in *Wallace v. Jaffree*, *supra*, 472 U.S. at 56, "[A] statute that is motivated in part by a religious purpose may satisfy the first [*Lemon*] criterion." Indeed, "the First Amendment requires that a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion." *Id.* (emphasis added). *See also id.* at 66 (Powell, J., concurring) (same).[2]

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[2] The Court reaffirmed the *Wallace* formulation in *Bowen v. Kendrick*, 487 U.S. 589, 108 S. Ct. 2562, 2571 (1988), in which it upheld the Adolescent Family Life Act, 42 U.S.C. §§ 300z *et seq.*, against an Establishment Clause challenge. The Court rejected appellees' argument that, although "religious concerns were not the sole motivation behind the Act" and the Act had "a legitimate secular purpose," the Act was unconstitutional because it also had an impermissible religious purpose. *Id.* Rather, the Court concluded:

> The District Court rejected this argument, however, reasoning that even if it is assumed that the AFLA was motivated in part by improper concerns, the parts of the staute to which

The courts below held that the statute has the secular legislative purpose of giving state employees an additional "day off as a rest from their daily affairs" (Pet. App. A93), at a time in the year when there are no other state holidays for several months. Further, the court below enunciated the *specific* secular purpose underlying both the *timing* of the holiday and the choice of the particular day:

> We conclude that the Hawaii statute has a legitimate, sincere secular purpose, specifically to provide Hawaiians with another holiday, and thus is not motivated "wholly by an impermissible purpose." [*Bowen v. Kendrick, supra*, 487 U.S. at 602.] *There is nothing impermissible about considering for holiday status days on which many people choose to be absent from work for religious reasons.* That the state legislature was able to accomplish its secular purpose and at the same time *accommodate the widespread religious practices of its citizenry* is hardly a reason to invalidate the statutes. The statute satisfies the purpose prong of the *Lemon* test.

Pet. App. A38 (emphasis added).[3]

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appellees object were also motivated by other, entirely legitimate secular concerns. We agree with this conclusion.

Id. See also School District of Abington Township v. Schempp, 374 U.S. 203, 296-303 (Brennan, J., concurring).

The dissent below (Pet. App. A51-A53), as well as the dissent from denial of rehearing en banc (Pet. App. A112-A114), took issue with these clear and repeated holdings of this Court and maintained, instead, that to save a state enactment from Establishment Clause invalidity, an otherwise appropriate secular purpose must be "preeminent." Pet. App. A51. Petitioners do not appear to embrace this position, perhaps because it is squarely inconsistent with this Court's cases.

[3] Petitioners do not maintain that the secular purpose of adding a Spring holiday on a day that many state employees would otherwise choose to be absent from work is a "sham" purpose. *See, e.g., Bowen, supra*, 108 S. Ct. at 2571; *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987). And indeed, the record fully supports the con-

2. Petitioners first assert that the only secular purpose found below was the general purpose to have *some* other holiday (Pet. at 12), and then maintain that this case merits review because the Court of Appeals embraced the proposition that as long as there is a "broad, general" secular purpose, no examination of "the specific purpose" of the enactment is necessary (*id.* at 9).

Initially, this attempt to manufacture an issue for this court to review fails because, as the quotation above indicates, the courts below *were* quite specific about the secular legislative purpose behind the Statute. Contrary to petitioners' assertion, the courts properly determined that the specific secular purposes for choosing Good Friday *particularly* were: 1) to add an additional state holiday, 2) so that state employees might enjoy a rest from their daily affairs, 3) during a period of the year that had no other state holidays, and 4) on a day that many state employees would otherwise choose to be absent from work. *See* discussion, *supra*, p. 4. Since they fail to acknowledge this identification below of a very specific legislative purpose, petitioners are asking this Court to decide a question not raised by this case at all.

Moreover, the authorities on which petitioners rely for the supposed requirement of hyper-specificity fail to support their legal argument. Those cases relate to

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clusion of the courts below concerning the reasons Good Friday was chosen as the additional holiday: the legislative history shows that the holiday was added to a period of the calendar which had the fewest state holidays. *See* Pet. App. A91. While the date of Good Friday fluctuates between mid-March and mid-April, the period of its fluctuation is in the middle of a ninety-day period with no other state holidays. *See id.*

Moreover, it is undisputed that "large numbers of Hawaiians observe Good Friday . . . . [and] will take at least part of the day off anyway, in order [to] attend religious services." *Id.* at A40. Thus, the day is a convenient holiday from the state's point of view, since the state's functioning will be in any event impaired on that day due to the absence of many employees.

the issue of whether there was *any* sincere secular legislative purpose (as opposed to a sham purpose), not to whether an existing sincere secular legislative purpose was *specific* enough to satisfy the first *Lemon* criterion.

For example, in *Epperson v. Arkansas*, 393 U.S. 97 (1968), which is relied upon heavily by petitioners (*see* Pet. 10), the Court held that a state law prohibiting the teaching of the theory of evolution in the public schools was not saved from invalidity under the Establishment Clause merely because (as the State Supreme Court had asserted) it was "a valid exercise of the state's power to specify the curriculum in the public schools." *Id.* at 101 n.7. The Court rejected this statement of a secular purpose as a sham, and found that the *only* purpose underlying the statute was "fundamentalist sectarian conviction." *Id.* at 108. As noted above, the secular legislative purpose behind the statute in the present case is clearly not a sham.

Moreover, to the extent that the assertion of the State Supreme Court in *Epperson* constitutes a "purpose" at all, it is not analogous to the secular purpose found by the courts below. An analogous "purpose" here would have been that the Statute was "a valid exercise of the state's power to specify" state holidays. The purpose identified by the courts below, however, went far beyond this platitude and instead specified the secular *reasons* for declaring *that day* a state holiday.[4]

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[4] Similarly, in *School District of Abingdon Township, supra*, 374 U.S. 203, the Court dismissed as a sham the asserted secular legislative purposes behind a state law requiring that the public school day begin by reading aloud passages from the Bible—to promote moral values, to counterbalance "the materialistic trends of our times," to perpetuate our institutions and to teach literature—and concluded that the only real purpose of the statute was religious. *Id.* at 223. First, the Court relied upon the fact that the case came to the Court on demurrer, so that the assertion in the Complaint that there was no legitimate secular purpose must be deemed to have been admitted. *Id.* at 223-24. Second, the Court

Since the specific secular legislative purpose underlying the Statute is not a sham, the possible existence of other religious purposes (*see* Pet. 11-12) is simply irrelevant. *See Bowen, supra*, 108 S. Ct. 2562; *Wallace, supra*, 472 U.S. 38.[5]

3. Petitioners' second argument asserts that the Court of Appeals mischaracterized the legislative history of the statute by "borrow[ing]" the secular legislative purpose found by the Court to underlay the Sunday closing laws in *McGowan v. Maryland*, 366 U.S. 420 (1961), and "substitut[ing] it for the Hawaii legislature's express, preeminent religious purpose for the 1941 Good Friday holiday law." Pet. 14-15. On this basis, petitioners "ask the Court to decide whether the courts are free to discard legislative intent and substitute their own statement for the legislature's purpose." Pet. 15.

This argument, despite its fancy dressing, amounts to nothing more than the contention that the courts below misread the legislative intent. Even if petitioners were correct in this regard, the question whether or not a court of appeals misunderstood the purpose of the legislature of a single state (actually, here, a territory) in enacting a particular statute does not, standing alone, merit this Court's attention.

Moreover, it is petitioners, not the Court of Appeals, who have misread the legislative history. There is, in fact,

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held that the statutory exceptions made clear that the asserted secular purposes would not be accomplished by the statute. *Id.* at 224. Finally, the Court noted that the state did not present the Biblical passages in the context of a secular program of education, but rather as a religious exercise. *Id.* at 225. Again, the case did not turn on whether the asserted secular purposes were too general, but rather whether they were a sham.

[5] Moreover, for the reasons set forth by the State Respondents, we submit that petitioners have misread the legislative history to create a religious purpose behind the Statute. *See* State Resp. Br. 6-9.

nothing in the legislative history of the 1941 Statute that suggests a religious purpose. *See* Pet. App. A32. To divine a religious purpose, petitioners are relegated instead to the legislative histories of the bills *preceding* the 1941 Statute, which were not enacted into law. While the earlier bills may be relevant to the purpose inquiry (*see Edwards, supra*, 482 U.S. at 594), they are certainly not determinative.

In any event, the secular legislative purpose of the Statute is clear from the face of the law and the legislative history of the 1939 bill. The legislature desired to add another Spring holiday, and was faced with a situation in which many employees were taking personal leave from work to attend church services on Good Friday.[6] Even if that purpose were not expressed in the legislative history, however, the Court of Appeals would have been justified in discerning it from the Statute and its history. As the Court held in *Mueller v. Allen*, 463 U.S. 388, 395 n.4 (1985), the fact that a statute "contains no express statements of legislative purposes, and its legislative history offers few unambiguous indications of actual intent. . . . does not affect [the Court's] treatment of the statute [under the purpose prong of the *Lemon* test]." Rather, the Court is "reluctan[t] to attribute unconstitutional motives to the States, particularly when a plausible secular pur-

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[6] *See* Pet. App. A33 (1939 Committee Report specifies that an increasing number of churches were holding lengthy services on Good Friday, and an increasing number of private employers were giving their employees time off to attend such services). It is no answer to assert that no accommodation to the wishes of state employees was necessary because they could already use their personal vacation time in order to take the day off. *See* Pet. 13 n.20. The state holiday is clearly a preferable accommodation to the large number of employees who otherwise would be obliged to use up their personal vacation time for this purpose. And because the state's operation is necessarily impaired on a day when a large number of employees are absent, closing governmental operations on that day rather than on one on which full operation would otherwise be possible makes sense from an administrative point of view.

pose for the State's program may be discerned from the face of the statute." *Id.* at 394-95.[7]

Indeed, in Establishment Clause cases, the Court will defer to the lower federal courts' "rational construction" of the purpose of a state statute, because district and circuit courts are " 'better schooled in and more able to interpret the laws of their respective States.' " *Edwards, supra*, 482 U.S. at 609 (White, J., concurring) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985)). Because the Court of Appeals' construction of the secular legislative purpose of the Statute is, at worst, rational, this Court's review would, under established doctrine, result simply in reaffirming that construction. For this reason as well, petitioners have not presented a certworthy issue.

4. Petitioners' final argument asserts that merely by scheduling a state holiday to coincide with a religious holiday, the state, without more, "endorses" religion in violation of the Establishment Clause. *See* Pet. 15-18. In making their argument, petitioners seize upon a purported distinction between Good Friday and Christmas, characterizing the latter but not the former as a secularized religious holiday. Regardless of the correctness of this distinction,[8] Petitioners have entirely failed to address the most pertinent analogy to the Statute—the Sunday closing cases.

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[7] *Accord Wallace, supra*, 472 U.S. at 75 (O'Connor, J., concurring) ("Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief 'was and is the law's reason for existence' " (quoting *Epperson, supra*, 393 U.S. at 108)).

[8] Since the Court of Appeals agreed with petitioners on this point (*see* Pet. App. A49 n.19), the questions whether or not Good Friday is a secularized holiday and what standards should be applied in making that determination are not presented by the Petition in this case.

In *McGowan v. Maryland*, 366 U.S. 420 (1961), *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961), *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961), and *Braunfeld v. Brown*, 366 U.S. 599 (1961), the Court upheld against Establishment Clause challenges state laws requiring certain businesses to be closed on Sundays. The Court expressly acknowledged that, as a historical matter, both Sunday closing laws in general and the particular statutes in question were strictly religious in origin, i.e., to mandate the observance of the Christian sabbath. *See McGowan, supra*, 366 U.S. at 431-33, 445-47; *Gallagher, supra*, 366 U.S. at 625; *Two Guys, supra*, 366 U.S. at 592-94. The Court upheld the Sunday closing laws notwithstanding their religious origins, however, because it recognized that over time the laws had acquired additional secular aspects and therefore "neither the statute[s'] purpose nor [their] effect is religious." *Two Guys, supra*, 366 U.S. at 598.

Specifically, the Court noted that both the federal and state governments had become increasingly concerned with "the improvement of the health, safety, recreation and general well-being of our citizens" (*McGowan, supra*, 366 U.S. at 444), and that to secure such improvement they have enacted "[n]umerous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of women and children, week-end diversion at parks and beaches, and cultural activities of various kinds" (*id.* at 444-45). The Court then examined the Sunday closing laws within this secular context:

> Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its sec-

> ular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

Id. at 445. The Court continued by noting the many secular functons that a day of rest on Sunday has come to serve in our society:

> Moreover, it is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like. "Vast masses of our people, in fact, literally millions, go out into the countryside on fine Sunday afternoons in the Summer. * * *" 308 Parliamentary Debates, Common 2159. Sunday is a day apart from all others. The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord.

Id. at 451-52 (footnote omitted).

The present case is even less problematic than the Sunday closing cases. Here, the religious origin of the Statute is less clear and, unlike the Sunday closing cases, there was a legitimate secular purpose *ab initio*. Indeed, there is no record evidence that the collective bargaining agreements, which now mandate the observance of the holiday as much as does the Statute, were motivated in any degree by religious considerations. Moreover, the impact of the Statute is much less intrusive than the Sunday closing laws because the Statute does not regulate how private parties must operate their businesses.

In other aspects, the Statute is strikingly similar to the Sunday closing laws. Like the Sunday closing laws, the Statute seeks to provide a day of respite from work during which state employees can pursue a variety of recreational or devotional activities of their own choosing, and the record evidence demonstrates that good advantage is in fact taken of this opportunity to pursue secular activities.[9] Moreover, the secular nature of the Statute is evidenced by the fact that its "proponents" are not "exclusively representatives of religious interests." *McGowan, supra*, 366 U.S. at 435. Rather, "labor groups" such as Respondents AFSCME vigorously support the Statute as providing a needed respite from work on a day convenient for that purpose. *See id.* Finally, like the Sunday closing laws, the Statute does not in any way mandate or even encourage any sectarian or devotional activity on the holiday; as noted above, state employees are free to pursue any activities they desire.[10] In all, state employees of all religions, as well as those with no religion, have come over the years to regard Good Friday as a day off from work to pursue personal activities.

For the foregoing reasons, this case is on all fours with the Sunday closing cases. As the Court of Appeals concluded, by scheduling a state holiday to coincide with a day that a great number of state employees would otherwise be absent from work, the Statute merely ac-

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[9] *See, e.g.*, Declaration of Robert B. Robinson, October 17, 1987, C.R. 61 (shopping); Declaration of Lex Brodie, October 14, 1987, C.R. 63 (servicing automobiles); Deposition of Genie Lucas at 25 (shopping); Deposition of Douglas Root at 85-86 (shopping); Declaration of Richard Kanayama, C.R. 47 (outdoor activities in state parks); Letter from Hiram Kamaka to Richard Wurdeman, July 9, 1987, C.R. 23 (outdoor activities in city parks).

[10] *Cf. Mandel v. Hodges*, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976) (state law mandating that state government offices close for three hours on Good Friday violates the Establishment Clause because the timing of the release encourages employees to attend religious services).

knowledges religion, but does not "endorse" it in violation of the Establishment Clause. As this Court has concluded, "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets or some or all religions." *McGowan, supra*, 366 U.S. at 442. To the contrary,

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).

Because the Statute merely adjusts the schedule of the State's public holidays to acknowledge the religious practices of a large number of its employees, it does not endorse religion in violation of the Establishment Clause, and review by this Court is not warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 17, 1992